APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED SEPTEMBER 7, 2001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1109

ROBERT J. MATZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 1095 — **Joan B. Gottschall**, *Judge*.

On Remand From
The United States Supreme Court

SUBMITTED JULY 25, 2001 — DECIDED SEPTEMBER 7, 2001

Before BAUER, COFFEY, and KANNE, *Circuit Judges*.

Appendix A

BAUER, *Circuit Judge*. Robert J. Matz filed an ERISA action, claiming entitlement to benefits as a result of a partial termination of a retirement benefit plan. The district court held that in determining whether partial termination occurred: (1) both vested and non-vested plan participants should be counted, *see Matz v. Household Int'l Tax Reduction Inv. Plan*, 1998 WL 851491, *5 (N.D. Ill. Dec. 1, 1998); and (2) multiple plan years could be aggregated, *see* 1999 WL 754659, *6 (N.D. Ill. Sept. 9, 1999). The Plan contested the district court's decisions on interlocutory appeal, and in 227 F.3d 971 (7th Cir. 2000), we affirmed. The Plan petitioned for writ of certiorari, which the Supreme Court granted, thereby vacating and remanding the case to us for further consideration in light of *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001). On remand, we are faced with the question of to what extent we must defer to the interpretation of "partial termination" by the IRS found in an amicus brief, which is one of the agencies responsible for administering the partial termination statute.

In *Mead*, the Supreme Court tried to delineate levels of judicial deference owed to actions by administrative agencies. *See id.* at 2176. The Court held that *Chevron* deference is mandatory when Congress has expressly or implicitly indicated that it intended an agency to speak with the force of law on a matter, and the agency's position on that matter is reasonable. *See id.* at 2171-72. The Court explained that Congress generally indicates its intention "when it provides for a relatively formal administrative procedure," such as "notice-and-comment rulemaking or formal adjudication." *Id.* at 2172-73. However, the Court left open the possibility that *Chevron* deference may be appropriate in some instances

even without such formality, although it did not clearly outline these instances. *See id.* at 2173.

In delineating this spectrum of deference, the Court confirmed its holding in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . ." *Id.* at 2175 (quoting 323 U.S. at 139). The Court instructed that determining whether *Skidmore* deference is owed turns on the " 'thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " *Id.* at 2172 (quoting *Skidmore*, 323 U.S. at 140). Generally, pursuant to *Skidmore* deference, an agency's position may be accorded respect depending on its persuasiveness. *See id.* at 2175-76.

In our first opinion in this case we echoed the district court's sentiment that if we were writing on a blank slate we would be inclined to hold that only non-vested participants ought to be counted in determining whether partial termination occurred. However, we felt constrained by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) to defer to the IRS' reasonable interpretation of the partial termination statute. In taking this position, we mimicked the reasoning in *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106 (2d Cir. 1991). In *Weil*, the Second Circuit asked the IRS to submit an *amicus* brief regarding the meaning of "partial termination." 933 F.2d at 107. Supported by Revenue Rulings and its position in the Plan

Termination Handbook contained in the Internal Revenue Manual, the IRS submitted its interpretation that " 'all terminated participants, both vested and non[-]vested, should be counted in determining whether a partial termination has occurred.' " *Id.* The *Weil* panel deferred to the IRS' offered position in the amicus brief pursuant to *Chevron*. And, in our first opinion in this case, we deferred to the *Weil* court's deference.

We now hold that the IRS' position in the *amicus* brief was an informal agency policy pronouncement not entitled to *Chevron* deference. *See Callaway v. C.I.R.*, 231 F.3d 106, 132-33 (2d Cir. 2000) (following *Auer v. Robbins*, recognizing that the court had previously afforded *Chevron* deference to an agency's position in an *amicus* brief, but holding that the agency's position in the brief was inconsistent with positions it had previously taken); *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 365 (4th Cir. 2000) (holding that the Secretary of Labor's interpretation of the Fair Labor Standards Act urged in an *amicus* brief was not entitled to *Chevron* deference); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (discussing *Auer* and *Chevron* regarding the amount of deference an *amicus* brief is due); *Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 875 (7th Cir. 1999) (same); *but see Auer v. Robbins*, 519 U.S. 452, 462 (1997) (affording *Chevron* deference to the Secretary of Labor's interpretation of the Fair Labor Standards Act in its amicus brief because it was not a *post hoc* rationalization and reflected the agency's fair and considered judgment); *Jones v. American Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999) (relying on *Auer* to hold that the EEOC's interpretation of Title VII in its *amicus* brief was entitled

to *Chevron* deference because it was not a *post hoc* rationalization and reflected the agency's fair and considered judgment, and was a valid interpretation). Although the Supreme Court indicated in *Mead* that *Chevron* deference may apply to interpretations developed from less formal rulemaking procedures, it did not expressly outline when this would be the case. The IRS' position in the *amicus* brief was not born from a formal policymaking procedure. We do not believe that a position set forth in an *amicus* brief, supported by some Revenue Rulings and an agency manual are formal enough to warrant Chevron treatment. In *Mead*, the Court declined to give *Chevron* deference to a tariff classification ruling issued by the United States Customs Service. 121 S. Ct. at 2174. The Court explained that deference was not due because Congress did not indicate that it meant to delegate authority to Customs to issue classification rulings with the force of law, Customs did not engage in notice-and-comment practice when issuing the rulings, and they were not binding on third parties. *See id.* We do not consider a position in an *amicus* brief to be more deserving of *Chevron* deference than a tariff classification ruling. Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines, *see id.* at 2175, are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*.

Therefore, since we are not bound by the IRS' position under *Chevron*, any deference we afford it under *Skidmore* depends on its thoroughness, validity, consistency, and persuasiveness. As noted, in our first opinion, although we

found the IRS' position reasonable under *Chevron*, we also found it unpersuasive. As we noted, the meaning of "partial termination" is unclear because the statutory language is ambiguous, the Treasury Regulation is not helpful, the statutory framework offers no assistance, and the legislative history provides little more guidance. *See Matz*, 227 F.3d at 974. Thus, we looked to the statute's purposes, which are to protect employees' legitimate expectation of pension benefits, and to prevent employers from abusing pension plans to reap tax benefits. *See id.* at 975. We agree with the Plan that counting vested participants "would further neither of these purposes." *Id.* "Vested participants do not need further protection for their pension benefits and do not benefit from a finding of partial termination. Their benefits, by virtue of vesting, are nonforfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non[ ]forfeitable." *Id.* We agreed with the notion voiced in *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989) and *Weil* that perhaps only non-vested participants ought to be counted, although neither court so held. Since we indicated that if we were writing on a blank slate we would have held differently, we now adopt the rule that only non-vested participants should be counted in determining whether partial termination of a pension plan has occurred.

Finally, the Plan asks us to reconsider our holding that multiple plan years can be aggregated in determining partial termination. *See Matz*, 227 F.3d at 976-77. We decline to do so. This aspect of our holding paid no deference to the IRS expressly because the IRS had not taken a position on the issue. *See Matz*, 227 F.3d at 977. Thus, since we analyzed

the issue without deference to the IRS, the Supreme Court's vacation and remand in light of *Mead* did not implicate this holding; therefore, it stands.

Thus, we hold that only non-vested participants should be counted in the partial termination analysis, and hereby REVERSE and REMAND this case to the district court for further proceedings consistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING PETITION AND REMANDING CASE TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JUNE 25, 2001

SUPREME COURT OF THE UNITED STATES

No. 00-1279

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

petitioner,

v.

ROBERT J. MATZ

June 25, 2001

On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *United States v. Mead Corp.*, 533 U.S. __, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED SEPTEMBER 21, 2000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1109

ROBERT J. MATZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 1095 — **Joan B. Gottschall**, *Judge.*

ARGUED MAY 17, 2000 — DECIDED SEPTEMBER 21, 2000

Before BAUER, COFFEY and KANNE, *Circuit Judges.*

BAUER, *Circuit Judge.* Robert J. Matz and other employees of Hamilton Investments, Inc. lost their jobs and the non-vested portions of their retirement benefit plan in 1994 when the company was sold. Matz filed suit on behalf

of himself and other terminated employees who were participants in the ERISA pension plan, claiming entitlement to the benefits as a result of a partial termination of the plan. To prove partial termination, he seeks to count both vested and non-vested participants and, because he believes that the partial termination was the result of a multi-year corporate reorganization, to aggregate terminations that occurred in multiple plan years. The District Court ruled that he could do both, and certified the issues to us for interlocutory appeal. We affirm.

I. BACKGROUND

In 1994, Household International, Inc. was the parent corporation of a varied group of companies. Its portfolio included mortgage companies, banking institutions, retail securities brokerages, insurance businesses and credit card companies. In August, 1994, Household began selling off some of its subsidiaries, beginning with Hamilton Investments, Inc., the company for which Robert Matz worked from March 28, 1989 until his termination on September 1, 1994.

Hamilton, through its parent corporation Household, provided a retirement benefit plan ("the Plan") to its employees. It was an employee benefit plan within the meaning of 29 U.S.C. § 1002(2)(A). The Plan allowed participants to make payroll contributions which were matched by contributions from Hamilton. Although the participant's contributions vested immediately, Hamilton's contributions were subject to deferred vesting. Section 14.1 of the Plan provided that a participant became vested in

Hamilton's contributions at a rate of 20% per year. Thus, a participant had to remain with Hamilton for five years before he became fully vested. If his service to the company ended before that time, he forfeited the non-vested portion of Hamilton's contribution.

When Matz's job ended he had a 60% vested benefit in his employer's matching contribution. He elected to take a distribution and was paid $27,914.10, which represented 100% of his contributions to the Plan and 60% of Hamilton's contributions. The remaining 40%, $7,289.92, was forfeited and used by Household to reduce its matching contributions.

Matz sues to recover his forfeited amount. If he can prove that there was a termination or partial termination of the Plan,[1] ERISA affords him relief. 26 U.S.C. § 411(d)(3) provides:

> A trust shall not constitute a qualified trust under § 401(a) unless the plan of which such trust is a part provides that —
>
> > A. Upon its termination or partial termination . . . the rights of all affected employees to benefits accrued to the date of such termination, partial termination or discontinuance, to the extent funded as of such date, or the amounts credited to the employee's accounts are nonforfeitable.

1. There is no dispute that the Plan continued after the sale of Hamilton. Thus, our inquiry focuses on the issue of partial termination.

ERISA does not, however, define what constitutes a partial termination. Treasury Regulation § 1.411(d)-2(b)(1) provides some guidance:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to **all the facts and circumstances** in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

(emphasis added).

Matz alleges that a partial termination of the Plan occurred beginning in August, 1994 (with the sale of Hamilton) and ending in May, 1996. During that period, Household discontinued or sold Household Mortgage Services, Inc., various branches of Household Bank, F.S.B., and Alexander Hamilton Life Insurance Company. Matz believes that this series of corporate transactions were part of a single reorganization plan and resulted in the Plan's partial termination. For that reason, he seeks to combine all of the terminations by Household in all of those years. He also seeks to count all fully vested employee terminations as well as non-vested employee terminations.

The Plan, by contrast, contends that a partial termination analysis should look at individual plan years, not aggregated

years. Furthermore, it argues that aggregation is inappropriate because there was no corporate reorganization that would justify such an approach. It also asks that only non-vested participants be counted. Finally, the Plan contends that any partial termination analysis must end on September 30, 1995, the date it issued a plan amendment vesting, fully and immediately, all participants.[2] Pointing to the language of 26 U.S.C. § 411(d)(3), the Plan states that participants who separated from service after September 30, 1995 cannot be "affected employees" because all Plan accounts became non-forfeitable at that time.

The parties briefed the issues to the District Court. The court, after careful analysis, ruled that both vested and non-vested participants could be counted to determine whether a partial termination occurred and that Matz could combine all terminations for 1994 through 1996. *Matz v. Household International Tax Reduction Investment Plan*, 1998 WL 851491 (N.D.Ill. 1998); *Matz v. Household International Tax Reduction Investment Plan*, 1999 WL 754659 (N.D.Ill. 1999). Upon the Plan's motion, the rulings were certified for interlocutory appeal. Now before us are the questions: (1) whether, for purposes of determining if the Plan was "partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment; and (2) whether the plaintiff's partial termination analysis may include terminations that take place over multiple (here, three) plan years. We affirm the District Court.

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2. The amendment provides that "if a Participant's employment with [Household and its affiliates] is terminated for any reason on or after September 30, 1995 he shall be 100% vested in his account."

Appendix C

II. DISCUSSION

The question of whether a partial termination has occurred is a question of law subject to *de novo* review. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988). Although many courts have addressed the issue of partial termination, few have addressed the questions of whether fully vested participants must be counted and whether the counting period is an individual plan year or the aggregation of multiple plan years. Indeed, they are issues of first impression to this court. We find that Matz has standing to raise these issues and address each one in turn.

A. Counting Of Vested And Non-Vested Participants

When interpreting congressional statutes, we look first at the plain language of the statute. *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). If the language is clear and unambiguous, we apply the statute so as to give effect to its plain meaning. *United States v. Hayward*, 6 F.3d 1241, 1245 (7th Cir. 1993). We cannot do that here because, although 26 U.S.C. § 411(d)(3) refers to a partial termination, it does not define it. Nor does it provide us with the framework for an analysis. Thus, we must search the legislative history for instruction.

The legislative history provides little more guidance than that found in the statute. The House and Senate Reports state only that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan."

Appendix C

H.R.Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S.Rep. No, 383, 93rd Cong. 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935. Although this is somewhat more helpful, it still does not provide us with a clear standard by which to judge a particular case.

Our sister circuit struggled with the same dilemma before inviting an *amicus* brief from the IRS. *See Weil v. Retirement Plan Administrative Committee*, 933 F.2d 106, 109-10 (2nd Cir. 1991) ("*Weil III*"). The *Weil III* decision, finding that vested and non-vested participants must be counted when determining whether a partial termination occurred, was the culmination of several decisions by the District Court and the Second Circuit. Initially, the District Court ruled that a partial termination had not occurred. *Weil*, 577 F.Supp. 781 (S.D.N.Y. 1984). The Second Circuit reversed. *Weil*, 750 F.2d 10 (2d Cir. 1984) ("*Weil I*"). On remand, the District Court, counting both vested and nonvested participants, found that a partial termination had occurred. *Weil*, 1988 WL 64862 (S.D.N.Y. 1988). The Second Circuit reversed again, holding that only non-vested participants should be considered. *Weil*, 913 F.2d 1045, 1050-51 (2nd Cir. 1990) ("*Weil II*").

On rehearing, the *Weil III* court had the benefit of the IRS' position of the issue. Giving "great weight" and deference to the IRS' view that both vested and non-vested participants should be counted, the Second Circuit vacated, in part, its ruling in *Weil II* and held that both classes of participants were to be considered in a partial termination analysis. *Weil*, 933 F.2d at 110. In so doing, the court found that the IRS' interpretation was reasonable and judicial deference was required as the IRS was the agency responsible for administering the partial termination statute. *Id.*

Appendix C

"Courts have generally held that termination of a number of employees does not constitute a 'partial termination' unless there is a significant reduction in plan participants." *Matz*, 1998 WL 851491, *2. To determine whether there is a significant reduction in plan participants, courts apply a "significant percentage" test. *Kreis v. Charles O. Townley, M.D. & Associates*, 833 F.2d 74, 79 (6th Cir. 1987). Partial termination is measured by using the ratio of terminated plan participants over total plan participants.

Matz urges us to include all terminated participants (vested and non-vested) in the numerator, while the Plan asks us to consider only the non-vested participants in the top of the equation. Both claim that their method best furthers the purposes of the statute. Once again, however, both the statute and its legislative history are silent as to the purpose of the partial termination statute. Courts, though, have generally understood the statute's purposes to be: (1) to protect employees' legitimate expectation of pension benefits; and (2) to prevent employers from abusing pension plans to reap tax benefits. *Weil*, 933 F.2d at 106, 107; *Halliburton v. Commissioner of Internal Revenue*, 83 T.C. 154, 161 (1984).

The Plan argues that the counting of vested participants would further neither of these purposes. It states "[t]he partial termination remedy is aimed at protecting employees from a forfeiture of unvested benefits, and preventing employers from receiving sizable, tax-free reversions of surplus plan assets." From a policy standpoint, the Plan makes a logical argument. Vested participants do not need further protection for their pension benefits and do not benefit from a finding

of partial termination. Their benefits, by virtue of vesting, are nonforfeitable. The employer gains nothing either. No monies revert back to it because the benefits are vested and non-forfeitable. We agree with the Plan's arguments. And, as the District Court stated, "if [we] were writing on a blank slate, [we] would be inclined to consider only non-vested employees" in deciding whether a partial termination had occurred. However, we are not writing on a clean slate.

We are not alone in our view or our holding. The District Court for the Eastern District of Louisiana ruled that both vested and non-vested terminees must be considered, "[e]ven though the issue of partial termination affects only non-vested participants." *Morales v. Pan American Life Insurance Company*, 718 F.Supp. 1297, 1302 (E.D. La. 1989). Although the District Court's decision was appealed, the Fifth Circuit did not decide the issue, holding instead that plaintiff Morales, a vested employee, did not have standing to raise the issue on behalf of the non-vested employees. *Morales v. Pan American Life Insurance Company*, 914 F.2d 83, 86 (5th Cir. 1990).

In a thorough and thoughtful opinion, the District Court for the Southern District of Texas also agreed that neither policy was furthered by the counting of vested participants. But, it ruled that only non-vested terminees would be counted. *In re Gulf Pension Litigation*, 764 F.Supp. 1149, 1165 (S.D.Tex. 1991). Realizing that approach would skew the percentage calculation and cause it to be artificially low (thereby increasing the chances of finding that there had not been a significant reduction in plan participants) the court excluded vested participants from both halves of the ratio.

Id. at n.10. Having calculated in this manner, the court found a partial termination of the plan. On appeal, the Fifth Circuit did not consider whether a partial termination occurred and affirmed on other grounds. *Borst v. Chevron Corporation*, 36 F.3d 1308, 1314, n.11 (5th Cir. 1994) ("Because we do not consider whether or not a partial vertical (or horizontal) termination occurred, the district court's ruling on this issue is not conclusive between the parties.").

Purely from a policy standpoint, we believe that the method adopted in *Gulf Pension Litigation* best furthers the purposes of the partial termination statute. However, we are constrained in our analysis of the statute and must decide only whether the IRS' construction is reasonable. *See Weil*, 933 F.2d at 107-08. We conclude that it is. Neither the statute, its legislative history nor the Treasury Regulation mentioned above differentiate between vested and non-vested participants. Indeed, the Treasury Regulation says that a partial termination may occur when "a group of employees," previously covered by the plan, are excluded from the plan by reason of a severance from employment.

A finding of reasonableness is also supported by the fact that the exclusion of vested participants from the ratio calculation gives an inaccurate assessment of whether there has been a significant reduction in plan participation, the benchmark against which partial termination is measured. For the calculation to be accurate, the circumstances as a whole must be considered. This, we think, buttresses a finding that vested participants must be included.

"To uphold [the agency's interpretation] we need not find that [its] construction is the only reasonable one, or even

that it is the result we would have reached had the question arisen in the first instance in judicial proceedings . . . We need only conclude that it is a reasonable interpretation of the relevant provisions." *Weil III*, 933 F.2d at 107-08 (internal quotation marks and citations omitted.). For the above reasons, we find that there is a factual basis for finding that the IRS' interpretation of the statute is reasonable. That is the only question on which we must rule. The order of the District Court, finding that both vested and non-vested terminees must be considered in its partial termination analysis, is affirmed.[3]

B. Aggregation Of Multiple Plan Years

We next turn to the question of whether terminations occurring in multiple plan years can be combined in determining partial termination. Initially, we note that this issue has been addressed by only two other courts (excluding the District Court below) and both have found that it is permissible to aggregate terminations for multiple years. *Weil*, 750 F.2d at 13, n.2; *Gulf Pension Litigation*, 764 F.Supp. at 1167-68.[4] We add our voice to theirs.

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3. We make a special point of noting, for the sake of clarity, that employees who were vested in 1995 by virtue of the Plan amendment are to be counted. The fact that they vested because of the Plan amendment and not because of years of service is of no consequence.

4. In *dicta*, the United States Tax court stated "we do not agree that we should limit ourselves to considering the events of only one plan year in resolving the partial termination issue, as events bearing on such issue may extend over more than one year." *Halliburton*, 100 T.C. at 246.

Appendix C

Matz argues that it is proper to combine all participant terminations in 1994, 1995 and 1996 because Household engaged in a corporate reorganization during that time.[5] The Plan counters by arguing that because this a tax event, the relevant period should be one year, as are tax years. It also argues that "[a]ll of the published Revenue Rulings dealing with the issue of partial terminations" examined only terminations occurring within a single plan year. We note, however, that in all of the decisions cited by the Plan, the event that affected the plan participants occurred within one year. Thus, those cases are inapposite and unpersuasive in our analysis.

Neither the statute nor its legislative history specify whether aggregation is permissible. The IRS has taken no position on the issue and because of that we receive no guidance from it. The only instruction we have comes from Treasury Regulation §1.411(d)-2(b)(1), which provides that we must consider "all of the facts and circumstances in a particular case." No framework is provided beyond that.

We hold that because there is nothing in the language of the rule itself that requires a significant corporate event to occur within a plan year, Matz can combine terminations from 1994, 1995 and 1996, provided that he show that the corporate events of those years were related. We believe this view reflects the realities of the modern corporate world. Mergers and corporate reorganizations have grown into large and complex events, *see e.g.*, *In re Gulf Pension Litigation*,

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5. The issue of whether the defendant's events of 1994, 1995 and 1996 were a corporate re-organization or a corporate event is not before this court and we do not decide that issue.

764 F.Supp. 1149, and often cannot be completed in one year. Furthermore, to establish a rigid rule that only terminations in individual plan years can be counted allows an unscrupulous employer to terminate some participants in December of one year and January of the next year, thereby eviscerating both the purpose of protecting employee benefits and the purpose of prohibiting employers from reaping unfair tax benefits. We are convinced that the requirement that the multiple year terminations be proven related prevents a plaintiff from gaining undue advantage too.

III. CONCLUSION

For the foregoing reasons, the orders of the District Court, holding that both vested and nonvested participants both be counted and that multiple plan years may be aggregated, in considering whether the Plan was partially terminated, are affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED NOVEMBER 30, 1998

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 1095

Judge Joan B. Gottschall

ROBERT J. MATZ, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Robert J. Matz is seeking to bring a class action against the Household International Tax Reduction Investment Plan ("the Plan") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* He alleges that he is entitled to accelerated vesting of his pension benefits because his firing by Hamilton Investments, Inc. ("Hamilton"), a wholly owned subsidiary of Household International, Inc. ("Household"), was part of

a corporate reorganization that constituted a "partial termination" under the Plan and 26 U.S.C. §411(d)(3). Matz purports to bring this action on behalf of a class consisting of other employees of Household and its subsidiaries who were also denied vesting under the alleged partial termination. The parties agreed to brief preliminary issues before addressing class certification. Currently before the court is the Plan's motion requesting that this court find that (1) employees who were terminated after September 1995, when the Plan was revised to give full vesting to terminated employees, shall not be considered for the purposes of determining if a partial termination occurred and (2) such employees may not be part of the class. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

Matz was employed by Hamilton from March 28, 1989 through September 1, 1994. As an employee of Hamilton, Matz participated in the Plan. The Plan is an employee benefit plan within the meaning of section 3(2)(A) of ERISA, 29 U.S.C. §1002(2)(A). Matz elected to make payroll contributions to the Plan. His contributions were matched by contributions from Hamilton.

The Plan contained a deferred vesting schedule for Hamilton's matching contributions. Section 14.1 of the Plan provides that a participant becomes vested at a rate of 20% per year, thus requiring five years of service for the participant to be 100% vested. However, Section 19.2 of the Plan provides that "in the case of the termination of the Plan by Household International, Inc. . . . or a partial termination of

the Plan with respect to a group of participants, the account balance of each affected participant shall become 100% vested." Presumably, the Plan contains this language in order to comply with 26 U.S.C. §411(d)(3), which requires an employee benefit plan to vest fully the benefits of participants when a plan is terminated or when there is a partial termination of the plan.

On September 1, 1994, when Matz was terminated, he had a 60% vested benefit in the employer's matching contributions to the Plan. After his termination from Hamilton, Matz received a distribution of his entire vested benefits in the amount of $27,914.10. This distribution was equal to 100% of the account balance attributable to Matz' own contributions to the Plan and 60% of the account balance attributable to the matching contributions from Hamilton. The remaining 40%, $7,289.92, was forfeited and was used by Household to reduce its matching contributions.

In September 1995, Household amended the Plan to eliminate the deferred vesting schedule and vest fully all participants. In particular, the Plan was amended to provide that "if a Participant's employment with [Household and its affiliates] is terminated for any reason on or after September 30, 1995 he shall be 100% vested in his account."

In this action Matz alleges that a partial termination of the Plan occurred between August 1994 and May 1996 and that he and other class members are thus entitled to 100% vesting in their account balances. Matz claims that he and other class members were terminated as part of Household's reorganization plan. Matz contends that during the course of

an approximately two and one-half year period, Household divested itself of certain non-core subsidiary businesses, such as mortgage, thrift banking, retail securities brokerage and insurance businesses. The Plan denies that a partial termination occurred and argues that the various business transactions between August 1994 and May 1996 were isolated transactions and not part of a reorganization plan.[1]

Courts have generally held that termination of a number of employees does not constitute a "partial termination" unless there is a significant reduction in plan participants. In determining whether there is a significant reduction in plan participants, courts often have applied a "significant percentage" test. *See Kreis v. Charles O. Townley, M.D. & Assoc.*, 833 F.2d 74, 79 (6th Cir. 1987). For the significant percentage test, courts look to see if a significant percentage of plan participants have been terminated.

In actions such as this one, calculating the percentage reduction is not straightforward because the parties often disagree on how to measure the number of plan participants

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1. The question of whether or not there was a reorganization plan is important because it may affect the determination whether a "partial termination" has occurred. As described *infra*, to establish a partial termination, Matz needs to prove that a significant percentage of plan participants were terminated. If, instead of relying only on the terminations resulting from the sale of Hamilton, Matz can aggregate the terminations from all transactions during the purported reorganization, it is more likely Matz will be able to show that a significant percentage of plan participants were affected and that a partial termination occurred. However, the question whether the various transactions may be aggregated for the purpose of determining if a partial termination occurred is not currently before the court.

terminated.[2] Here, Matz argues that both vested and non-vested plan participants who were terminated should be counted in determining if there was a significant reduction in plan participation. The Plan disagrees. In particular, in the present motion, the Plan argues that employees who were terminated after September 30, 1995 should not be counted for the purpose of determining if a partial termination occurred. As noted above, an amendment to the Plan granted full vesting to employees who were terminated after September 30, 1995.

This motion raises only the narrow issue of whether employees terminated after September 30, 1995 may be counted for the purposes of the partial termination analysis and whether they may be members of the class represented by Matz. The parties are not at this time seeking a determination whether a partial termination occurred or whether the various transactions between August 1994 and May 1996 may be aggregated for deciding if a partial termination has occurred.

DISCUSSION

The relevant statute and regulation do not provide any guidance on whether fully vested employees who are terminated should be counted in determining if a partial termination has occurred. Indeed, the statute and regulation

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2. For example, here, the parties dispute whether Matz can aggregate terminations over the course of approximately two and one-half years to come up with a greater percentage reduction or whether it is appropriate to consider only those employees who were terminated along with Matz when Hamilton was sold.

offer little assistance for analyzing whether a partial termination has occurred. Although 26 U.S.C. § 411(d)(3) refers to "partial termination," it does not define the term:

> a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that —
>
> (A) upon its termination or partial termination,
>
> * * *
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

26 U.S.C. §411(d)(3).

The relevant Treasury Regulation is not significantly more helpful:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely

> affect the rights of employees to vest in benefits under the plan.

Treas. Reg. §1.411(d)-2(b)(1).

The legislative history of §411(d)(3) likewise provides little insight into what constitutes a partial termination. The House and Senate Reports state that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan." H.R.Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S. Rep. No. 383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935.

Few courts have addressed whether fully vested employees who are terminated should be counted in a partial termination analysis.[3] In *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106, 109 (2d Cir. 1991) ("*Weil III*"), the Second Circuit, on rehearing, held that vested as well as non-vested plan participants must be counted when determining if a partial termination occurred. 933 F.2d at 109-10. *Weil III* was the culmination of several decisions by the district court and the Second Circuit. Initially, the district court ruled that a partial termination had not occurred. *Weil*, 577 F. Supp. 781 (S.D.N.Y. 1984). The Second Circuit reversed. 750 F.2d 10 (2d Cir. 1984) ("*Weil I*"). On remand, the district court found that a partial termination had occurred. In determining that a partial termination occurred, the district court included

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3. The parties have not cited to and the court has not found any partial termination cases in which a portion of the plan participants terminated were granted full vesting by an amendment to the plan.

both vested and non-vested participants in its calculation of the percentage of participants affected by the corporate reorganization. *Weil*, 82 Civ. 8468, 1988 WL 64862 (S.D.N.Y. Jun. 15, 1988). The Second Circuit reversed, finding that no partial termination had occurred. *Weil*, 913 F.2d 1045 (2d Cir. 1990) ("*Weil II*"). The court of appeals held that the district court should have considered only non-vested participants in determining if a significant reduction in plan participation had occurred. In reaching this conclusion, the court stated

> As the district court herein recognized, it "seems logical" to consider only non-vested participants in determining whether a partial termination has occurred, since these are the employees whose pension benefits are most affected by a termination. Vested participants who are discharged also are affected in that they are not eligible for future employer contributions. Nonetheless, the legislative history of the partial termination provisions suggest that one of Congress's concerns was to prevent the forfeiture of unvested pension benefits, and we do not believe that Congress also intended to insure future plan participation for those whose benefits already had fully vested. Moreover, to the extent that the partial termination rules are designed to prevent employers from creating pension plans for the purpose of evading tax liability, this interest would not seem to be implicated with respect to participants whose benefits have completely vested.

Weil II, 913 F.2d at 1050-51 (citations omitted).

Appendix D

On rehearing, the Second Circuit vacated in part its decision in *Weil II* and found that a partial termination had occurred. The court reviewed the language of the statute, the Treasury Regulation, and the legislative history concerning partial termination and concluded that the legislative intent behind §411(d)(3) is ambiguous. *Weil III*, 933 F.2d at 109. The court then examined the construction of §411(d)(3) by the Internal Revenue Service (IRS), which is the agency responsible for administering the partial termination statute.[4] The court noted that when Congress' intent for a statutory provision is ambiguous, a court should defer to the construction by the administering agency if it is a "permissible construction of the statute." *Weill III*, 933 F.2d at 107-08 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The IRS stated that its long-standing position is that all terminated participants, both vested and non-vested, should be counted in determining if a partial termination has occurred. The court found that the IRS' construction was reasonable in light of the statute's silence and the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizable reduction in benefits under the plan"). 933 F.2d at 110. The court noted that these reports suggest that "Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole." *Id.* The court also noted that neither the statute, the Treasury Regulation, nor the House and Senate Reports distinguished between vested and non-vested participants.

Like the court in *Weill III*, this court finds that the purpose behind the partial termination statute is ambiguous. Courts

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4. The IRS provided its interpretation of the statute in an amicus brief, which was submitted after the decision in *Weil II*.

have identified two possible purposes for the partial termination statute: (1) protecting the pension benefits of non-vested participants; and (2) preventing employers from abusing pension plans to reap tax benefits. *See Weil III*, 933 F.2d at 109. From a policy standpoint, it is unclear why courts should consider vested plan participants who are terminated in analyzing if a partial termination has occurred. Vested participants do not need further protection for their pension benefits (and of course do not "benefit" from a finding that a partial termination occurred), and an employer cannot reap tax benefits from terminating vested participants because vested participants do not forfeit any pension benefits to the employer. *See In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1165 (S.D. Tex. 1991) (noting that neither policy furthered by counting vested terminees in analyzing if partial termination occurred), *aff'd, Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994). If this court were writing on a blank slate, it would be inclined to consider only non-vested employees who were terminated in considering if a partial termination had occurred.

However, this court is not free to impose its own construction on the statute. Instead, this court must determine only whether the IRS' construction is reasonable. As was made clear in *Weil III*, the IRS has interpreted the partial termination statute as requiring that "all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred. The IRS thus measures partial terminations using the ratio of terminated plan participants (vested and non-vested) over total plan participants." *Weil III*, 933 F.2d at 106 (quotation omitted). Like the court in *Weil*, this court finds that the

interpretation by the IRS is reasonable. The examples of partial terminations given in the House and Senate Reports (such as "a large reduction in the work force") "suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole." *Weil III*, 933 F.2d at 110. The reports do not distinguish between vested and non-vested participants, i.e., the example does not refer to a large reduction in non-vested employees.

The Plan argues that the situation here is different from *Weil*. The Plan argues that, in contrast to *Weil*, where there was a mix of vested and non-vested participants who were terminated, here, after September 30, 1995, there were no longer any non-vested participants. Consequently, for employees terminated after September 30, 1995, there is no need for a partial termination remedy. However, this argument confuses the consequences of a partial termination — full vesting — with the standards for determining if a partial termination has occurred. The IRS has construed the partial termination statute so that the trigger for a partial termination is a significant reduction in plan participation, without regard to whether the terminated participants are vested or non-vested. If Matz' view of the case is correct — that the various corporate transactions between August 1994 and May 1996 were part of a larger corporate reorganization plan — then the effect of the September 1995 amendment in the plan was merely to increase the proportion of vested to unvested participants who were affected by the reorganization plan. Of course, the Plan may show that the various transactions were not part of a larger plan; that issue is not yet before the

court.[5] Nevertheless, assuming for the purposes of this motion that there was a reorganization plan, the situation here is not significantly different from that in *Weil*. As in *Weil*, there were vested and non-vested participants affected by the corporate actions.

Therefore, the Plan's motion is denied to the extent that it seeks to exclude plan participants who were terminated after September 1995 from the analysis whether a partial termination has occurred. However, the Plan's motion is granted to the extent that it seeks to exclude from the purported class participants who were terminated after September 1995. Matz failed to respond to this part of the motion, perhaps due to a belief that it was not properly raised. This court concludes that the matter was properly raised and that there is no basis for including such participants in the class. Due to the September 1995 amendment, these employees were fully vested and thus these employees have suffered no injury that can be redressed by this action.

ENTER:

s/ Joan B. Gottschall
JOAN B. GOTTSCHALL
United States District Judge

DATED: November 30, 1998

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5. If the Plan establishes that the various transactions and resulting terminations were not part of a larger plan, then only those participants terminated from Hamilton with Matz will be counted for the partial termination analysis.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 16, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 00-1109

ROBERT J. MATZ,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 96 C 1095

Joan B. Gottschall, *Judge.*

Appendix E

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-referenced case by plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.

APPENDIX F — BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN *WEIL, et al. v. RETIREMENT PLAN ADMINISTRATIVE COMMITTEE OF THE TERSON, CO., INC., et al.* DATED NOVEMBER 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WARREN WEIL and MARIA GALUPPO,

Plaintiffs-Appellees-Cross-Appellants

v.

RETIREMENT PLAN ADMINISTRATIVE COMMITTEE OF THE TERSON CO., INC., THE TERSON CO., INC., THE NORTHERN TRUST CO., as Trustees of the Terson Co., Inc. Salaried Retirement Plan,

Defendants-Appellants-Cross-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

Appendix F

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Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 89-9223, 89-9255

WARREN WEIL and MARIA GALUPPO,

Plaintiffs-Appellees-Cross-Appellants

v.

RETIREMENT PLAN ADMINISTRATIVE COMMITTEE OF THE TERSON CO., INC., THE TERSON CO., INC., THE NORTHERN TRUST CO., as Trustees of the Terson Co., Inc. Salaried Retirement Plan,

Defendants-Appellants-Cross-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

On September 13, 1990, this Court issued an opinion reversing the judgment of the District court in this case. The plaintiffs have filed a petition for rehearing. This brief is submitted pursuant to the Court's order of November 2, 1990, inviting the Government to submit a brief as *amicus curiae*.

STATEMENT

Warren Weil and Maria Galuppo (plaintiffs) were employed by Ward Foods, Inc., from 1973 until 1981.

Appendix F

Plaintiffs were participants in Ward's retirement plan (the Plan). In 1980, The Terson Company, Inc., acquired Ward. Terson's subsequent reorganization of Ward's operations resulted in the termination of the employment of more than 100 of the Ward employees who had been participants in the Plan, including the plaintiffs. As required by Section 411(d)(3) of the Internal Revenue Code, the Plan provided that in the event of its "partial termination," the terminated employees who were not yet vested in the Plan would be entitled to nonforfeitable benefits. Plaintiffs brought this action asserting that a "partial termination" of the Plan had occurred, and seeking a declaration that they were entitled to nonforfeitable benefits.

The District Court granted defendants' motion for summary judgment. *Weil* v. *Retirement Plan Admin. Committee*, 577 F. Supp. 781 (S.D.N.Y. 1984). Plaintiffs appealed and this Court reversed and remanded. *Weil* v. *Retirement Plan Admin. Committee*, 750 F. 2d 10 (2d Cir. 1984) ("*Weil I*"). The Court held that the "dismissal of a 'significant number of employees' in connection with a major corporate event constitutes a partial termination." *Id.* at 12 (emphasis omitted). Since the summary judgment record was inadequate to determine whether the Plan was partially terminated, the case was remanded for further proceedings. *Id.* at 13.[1] On remand, the District Court concluded that a partial termination had occurred. (A. 1437-1445.)[2] The court found that of the 386 employees participating in the Plan in

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1. At the Court's request, the Government filed an *amicus curiae* brief in *Weil I.*

2. "A." references are to the joint appendix.

1981, 132, or 33.4%, were terminated. Only 65 participants, or 16.4% of all employees participating in the Plan in 1981, were terminated without vested benefits. (A. 1441.) The court concluded that "a partial termination of the plan took place in 1981 when 33.4% of the plan participants were terminated in connection with Terson's acquisition and reorganization of Ward Foods." (A. 1445.)

Defendants appealed and this Court reversed. The Court held that in determining whether a significant number of employees were terminated only terminated participants whose pension benefits had not yet vested should be considered. Slip op. 6427-6430. The Court reasoned in this regard that, since terminated participants whose benefits had vested were fully protected regardless of whether the reduction in participants was deemed a partial termination, such vested former participants should be ignored in computing the percentage reduction in the number of participants. *Id.* at 6428-6429. In reaching this conclusion, the Court relied in part (*id.* at 6429) on a determination letter issued by the Internal Revenue Service (IRS) to the Ward retirement plan for earlier years (A. 905-906) wherein the IRS considered only non-vested participants in concluding that a 15% reduction in participation did not result in a partial termination. Focusing only on the 65 terminated non-vested participants, the Court concluded that, since only a 16.4% reduction in the number of employees participating in the plan had resulted from the reorganization of Ward Foods, there had not been a dismissal of a significant number of employees and, hence, a partial termination had not occurred. Slip op. 6430-6432.

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DISCUSSION

1. The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, Section 1012(a), added Section 411 to the Internal Revenue Code, setting minimum vesting standards for qualified pension plans. Among the conditions that a plan must meet in order to obtain the tax benefits accorded to qualified plans is the requirement, imposed by Section 411(d)(3), that the plan must provide that in the event of a "termination or partial termination" of the plan, "the rights of all affected employees to benefits accrued to the date of such termination, [or] partial termination * * *, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable." The statute does not define the term "partial termination." The Committee Reports on ERISA state that "a partial termination might include, under certain circumstances, a large reduction in the work force, or a sizable reduction in benefits under the plan." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 65 (1974-3 Cum. Bull. Supp. 236, 300); S. Rep. No. 93-383, 93d Cong., 2d Sess. 50 (1974-3 Cum. Bull. Supp. 80, 129).[3]

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3. Employees whose benefits are vested as of the time of the termination of their employment are entitled to nonforfeitable benefits regardless of whether their termination constituted a partial termination of the plan. See Code Sec. 411(a)(2)(A) and (B). Thus, the effect of the partial termination provision is that the accrued benefits of employees who are not yet vested become nonforfeitable, to the extent that those benefits have been funded. In the absence of a partial termination, terminated non-vested employees would forfeit all pension benefits.

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The Treasury Regulations under Section 411(d) provide that the Commissioner shall determine whether a partial termination has occurred based on "all the facts and circumstances in a particular case." Treas. Reg. § 1.411(d)-2(b)(1) (26 C.F.R.). One of the relevant circumstances described by the regulation is "the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan." Several Revenue Rulings indicate that a partial termination occurs where a significant percentage or number of plan participants are dismissed as a result of a significant change in the employer's business operations. Rev. Rul. 81-27, 1981-1 Cum. Bull. 228; Rev. Rul. 73-284, 1973-2 Cum. Bull. 139; see also Rev. Rul. 72-439, 1972-2 Cum. Bull. 223.

Relying on the above-cited legislative history, regulation, and rulings, this Court held in *Weil I* that the "dismissal of a 'significant number of employees' in connection with a major corporate event constitutes a partial termination." 750 F. 2d at 12 (emphasis omitted). Accordingly, in the instant appeal, the Court inquired into whether a significant percentage of employees covered by the Plan had been dismissed. The question presented in plaintiffs' petition for rehearing is whether only terminated non-vested employees should be taken into account in determining whether a significant percentage of employees were dismissed, as the Court held (slip op. 6427-6430), or whether all terminated employees, both vested and non-vested, should be taken into account. We submit that the Court's holding in this appeal reflects an incorrect interpretation of Section 411(d)(3) and the regulations thereunder. It appears that the Court's holding was based in substantial part on its view that the IRS

considers only terminated non-vested participants in determining whether a reduction in the number of plan participants is of sufficient magnitude to constitute a partial termination (slip op. 6429-6430). As we shall show, however, the IRS's position is that all terminated participants, both vested and non-vested, should be counted in determining whether a partial termination has occurred.

2. As noted above, the Committee Reports on ERISA state that "a partial termination might include, under certain circumstances, a large reduction in the work force." H.R. Rep. No. 93-807 at 65; S. Rep. No. 93-383 at 50. Similarly, the regulations state that "the exclusion, by reason of . . . severance by the employer, of a group of employees who have previously been covered by the plan" can be a partial termination. Congress contemplated that the term "partial termination" would encompass an event resulting in a significant contraction of a plan, such as a significant reduction in the number of plan participants. In measuring whether there has been such a significant reduction, logic alone would dictate that all terminated participants, vested as well as non-vested, should be taken into account. In referring to "a large reduction in the work force" and the severance of "a group of employees who have previously been covered by the plan," the Committee Reports and the regulation certainly draw no distinction between vested and non-vested employees.

The Court here compared the number of terminated non-vested participants with the total number of participants in computing the percentage used to determine whether there was a significant reduction in plan participation. The resulting

percentage measures neither the reduction in plan coverage as a whole nor the reduction in non-vested participants, and accordingly provides no accurate measure of whether there has been a "large reduction in the work force" or other significant contraction in the plan.[4] In the instant case, more than one-third of the Plan's participants were discharged as a result of the Terson takeover. This plainly was a "large reduction in the work force." Nevertheless, under this Court's methodology, the reduction in the plan's participants is too insignificant to be deemed a partial termination. This is telling evidence that the Court's methodology for determining whether a partial termination occurred is at odds with the legislative intent behind the partial termination provision of Section 411(d)(3).

3. Contrary to the Court's conclusion in its opinion (slip op. 6429-6430), the position of the IRS is that all plan participants, whether or not fully vested, are to be considered in determining whether there has been a partial termination. In the Revenue Rulings cited at p. 5, *supra*, the IRS compared

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4. To be sure, the *consequences* of a partial termination are different for vested and non-vested terminated participants. But the question whether there is a significant contraction of the plan, and hence a partial termination, is distinct from the question of the consequences of a partial termination. Moreover, even if the Court were correct in its view that the focus should be on non-vested terminated employees exclusively in determining whether a partial termination has occurred, the Court should have compared the number of terminated *non-vested* participants to the total number of *non-vested* participants prior to the Terson takeover, rather than comparing the number of terminated non-vested participants to the total number of employees, vested and non-vested, who were participants prior to the Terson reorganization.

the total number of plan participants and the total number of terminated participants in concluding that a significant number of participants were terminated. The Court stated that "these rulings do not indicate whether the distinction between vested and non-vested participants was at issue in those rulings." Slip op. 6427-6428. The distinction was not at issue because the IRS's position is that the distinction is not pertinent in determining whether a partial termination has occurred.

The Court referred in its opinion (slip op. 6431-6432) to the IRS's Plan Termination Standards, Document 6678 (4-81). (A. 159-163.) The Standards note that in Rev. Rul. 81-27 and Rev. Rul. 73-284, "a significant percentage of employees, in each case over 50%, were effectively excluded from participating in the plan." (A. 160.) They further state that "[t]here is no fixed percentage of employees, nor any fixed number of employees, that we may set as guidelines. The facts and circumstances must be considered for each case." (*Ibid.*) The Standards state that a "reduction in the number of employees covered by the plan" should be considered as a factor in the partial termination inquiry, and suggest, as an example, that "a reduction of 20% of the number of employees covered" might result in a partial termination "where the 20% represented the elimination of a division, a plant closing, the discontinuance of a particular product, etc." (*Ibid.*) Thus, the Plan Termination Standards look at a "reduction in the number of employees covered by the plan" but draw no distinction between vested and non-vested employees. The District Court correctly observed that "the language in the Standards suggests that the total number of covered employees terminated, regardless of their

vesting status, should be considered in figuring the percentage." (A. 1444.)

The Plan Termination Handbook contained in the Internal Revenue Manual expressly sets forth this long-standing IRS position. The Handbook states: "The Service takes the position that, in general, fully vested terminatees are included in determining whether there has been a partial termination. This position was upheld in *Weil* v. *Terson Co. Retirement Plan Committee*, 82 Civ. 8468 (S.D.N.Y. June 15, 1988)." IRM 7753, Chapter 252(7) (April 20, 1990), reprinted in 4 Administration, CCH Internal Revenue Manual at 21,151. This statement in the Plan Termination Handbook apparently was not brought to this Court's attention by the parties. The Court's mistaken view that the IRS considers only terminated non-vested participants in determining whether a partial termination has occurred (slip op. 6429-6430) was based primarily on a determination letter issued to Ward by a local IRS district office in 1981 that concluded that no partial termination of the Plan had occurred during the years 1975-1980 (A. 905-906). As the Court observed (slip op. 6429), the letter compared the number of terminated non-vested employees to the total number of plan participants in determining that there was not a significant percentage of terminated participants. That determination letter, however, insofar as it indicated that only non-vested participants are taken into account, did not represent the IRS's position then and hence was issued erroneously.[5]

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5. The Director of the Employee Plans Technical and Actuarial Division of the Internal Revenue Service has advised us that the position of the IRS is, and has been, that all terminated participants

(Cont'd)

Appendix F

The Court also relied on (slip op. 6429 n. 2) IRS Form 5310 (A. 680-684), which an employer must submit to the IRS to request a determination as to whether a plan has partially terminated. The Court noted that the form asks an employer to provide, in addition to the total number of terminated participants, the number of participants terminated without full vesting. (A. 682.) The Court stated that "the information requested by form 5310 provides further evidence that the IRS focuses on the number of non-vested participants when determining whether a partial termination has occurred." Slip op. 6429 n.2. The Court drew the wrong conclusion. The number, if any, of terminated non-vested participants is relevant because if all of the terminated participants are vested, the question whether there has been a partial termination would be a moot point, since the benefits of terminated vested participants are nonforfeitable regardless of whether there has been a partial termination. Moreover, although the number of terminated non-vested employees alone is not the appropriate means for measuring the magnitude of the reduction of plan participants, that number is relevant to one of the other factors examined in determining whether a partial termination has occurred, *viz.*, the possibility that forfeited pension benefits will revert to the

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(Cont'd)
are taken into account in determining whether a partial termination has occurred, and that, to the extent the determination letter issued to the Ward plan for earlier years indicated otherwise, the letter was and is contrary to the IRS's position. Although the defendants may be entitled to rely on the determination letter with respect to the years 1975-1980, they certainly cannot rely on that letter as setting forth the position of the IRS as to whether a partial termination occurred in 1981, the year in issue here.

employer. Both the Plan Termination Standards (A. 159, 160) and the Plan Termination Handbook (IRM 7753, Chapter 252(4) and (8)) state that the "potential for reversion" is a factor in the partial termination inquiry. Since the information required by Form 5310 is relevant for other purposes, that form provides no support for the Court's conclusion that the IRS focuses only on non-vested participants in determining whether a significant percentage of participants have been terminated.[6]

Finally, we note that the Court's opinion is somewhat unclear as to what numbers should be compared in determining whether there has been a significant reduction in plan participation. The opinion states that 16.4% of the plan's participants were terminated non-vested participants. Slip op. 6422; see A. 1441. But in its "significant percentage" inquiry, the Court stated that "only 16.4% of the non-vested participants were terminated." Slip op. at 6432; see also *id.* at 6430 (referring to "the discharge of 16.4% of the non-vested participants"). If the Court meant to compare the number of terminated non-vested participants with the total number of non-vested participants prior to the Terson

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6. The Court also stated that the deposition testimony of IRS Agent Chester Lamar confirmed that the IRS focuses on the percentage of non-vested terminatees. Slip op. 6429. Lamar's testimony is confusing at best; at some points in his deposition he seems to indicate that all terminated participants are taken into account in determining whether a significant percentage of participants were terminated. (A. 82-83, 120.) To the extent that his testimony in other places indicates to the contrary, he was misinformed as to the IRS's actual position.

takeover, then the 16.4% figure is erroneous.[7] If the Court meant to compare the number of terminated non-vested participants with the total number of participants, the 16.4% figure is accurate. In determining whether that percentage was "significant, the Court contrasted it to the 20% figure set forth in the IRS Plan Termination Standards, and to percentage reductions deemed insignificant in other cases. Slip op. 6431-6432 (citing *Kreis* v. *Charles O. Townley, M.D. & Assoc.*, 833 F. 2d 74 (6th Cir. 1987); *Morales* v. *Pan American Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989)). The Court, however, was comparing apples and oranges, because the percentage reductions in the Standards and those cases were based on a comparison of the total number of terminated participants (both vested and non-vested) with the total number of participants. The Court here compared the total number of terminated non-vested employees to the total number of participants.

The District Court concluded that "a partial termination of the plan took place in 1981 when 33.4% of the plan participants were terminated in connection with Terson's acquisition and reorganization of Ward Foods." (A. 1445.) Since the District Court applied the correct methodology in measuring the magnitude of the reduction in the number of

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7. The record does not appear to indicate the total number of participants who were non-vested at the time of the Terson takeover. Thus, the exact percentage reduction in the number of non-vested participants resulting from the Terson reorganization cannot be computed on this record. It is clear, however, that since, at the most only 319 of the 386 total participants were non-vested (A. 1441), the percentage reduction in the number of non-vested participants was greater than 20% and, in all likelihood, substantially larger than that.

participants and since a 33% reduction in the number of participants resulting from a corporate reorganization must be considered a partial termination within the intendment of Congress, the District Court's decision is correct.

CONCLUSION

For the foregoing reasons, the United States as amicus curiae respectfully suggests that the petition for rehearing be granted and that the judgment of the District Court be affirmed.

Respectfully submitted,

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